

5:05-cv-00143-CAB

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

05 NOV 28 PM 3:43
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

MARK BARCLAY
Petitioner,

Case No. 5:05 CV 143

v.

JUDGE Boyko

MARGARET BRADSHAW,
Warden, Respondent.

Magistrate Judge Limbert

PETITIONERS TRAVERSE /Answer
TO RETURN OF WRIT

Petitioner, pro se hereby submits his response to Respondents Answer/Return of writ filed and received by this court in the above listed Case No.

Attached hereto and in support of same is petitioners traverse with authority attacking Respondents answer, and setting forth more fully why this court should grant petitioners request pursuant to 28 U.S.C. §2254 by a person in State Custody.

Respectfully submitted,
Mark Barclay #434-816
Mark Barclay, Petitioner,

MEMORANDUM IN SUPPORT

On January 27th, 2005 Petitioner filed a pro se petition pursuant to §2254, seeking relief from his conviction by a State Court. In support of his claims, petitioner set forth four (4) grounds for this courts consideration.

On September 21, 2005 Respondent, Margaret Bradshaw submitted her response a copy of which was received by petitioner on the 23rd day of September.

On page 8, of Respondents answer Respondent alleges that "All of the grounds raised in Petitioner's petition for habeas corpus are procedurally defaulted as they were not fairly presented to the State courts."

The sixth Circuit uses a four-step analysis to determine whether a claim has been procedurally defaulted. see Maupin v. Smith, 785 F.2d 135 (6th Cir.) Under this test, the court determines (1) Whether the petitioner failed to comply with an applicable State procedural rule, (2) whether the State courts actually enforce the State procedural sanction, (3) Whether the State procedural bar is an "independant and adquate" State ground on which the State can foreclose Federal review, and if the previous elements are met, and (4) whether the petitioner has demonstrated "Cause and Prejudice". In essence a finding of procedural default stops habeas corpus relief, unless the petitioner can show cause for the default and actual prejudice see, Coleman v. Thomposon, 501 U.S. 722, 729 (1991) A petitioner can also overcome a procedural default if he can show that a failure to review his claim on their merits would be a fund-

umental miscarriage of justice. see, Murray v. Carrier, 477 U.S. 478, 496 (1989) Coleman v. Michell, 244 F3d. 533, 540 (6th Cir.)

THE CAUSE AND PREJUDICE EXCEPTION TO THE PRODEDURAL DEFAULT:

If the State has asserted the procedural default doctrin in a timely and proper fashion, and if each of the preconditions for its application has been satified,(i.e. if the petitioner actually committed a procedural default, the default provides an "independent and "adequate" State procedural ground for decision, and the last State c0urt decision unambiguously relied on this procedural ground to deny relief.) the petitioner is barred from raising the defaulted claim as a basis for Federal habeas corpus relief unless he can (1) excuse the default by demonstrating cause for the default and actual prejudice as a result of the alleged violation of Federal Law. or (2) Show that the case falls within the category of cases that the Supreme Court has characterized as "Fundamental Micarriages of justice. Coleman v. Thompson, *supra*, 501 U.S. at 750, Sawyer v. Whitley, 501 U.S. 333, 339 (1992), Dugger v. Adams 489, U.S. 401-11 (1989) Smith v. Murray, 477 U.S. 527, 537-38.

Cause, having first imported the concept of "Cause" into the habeas corpus contex in 1977, the Supreme Court has not yet "given the term the term "cause" precise content." or essayed a comprehensive, catalog of the circumstances that would justify a finding of cause. for a procedural default, accord, Edwards v. Carpenter, 529, U.S. 446, 451 (2000). Instead the court has stated generally that "cause" for a procedural default exists if the "prisoner can

show that some objective factor external to the defense impeded counsels efforts to comply with the States procedural rule. see *Murray v. Carrier*, *supra*, 477 U.S. at 488.

The concepts of objective factors and external impediment have broad application. Although the court has not yet said so in the habeas corpus context, its decisions in other contexts suggest that the "objective/external factors" capable of excusing a default may include all "extraordinary circumstances" suggesting that the party was prevented from complying by forces beyond its control. see Pioneer Invest. Serv. Co. v. Brunswick Assoc. Ltd Partnership, 507 U.S. 380, 387-88, 393-95. (1993) Klaprott v. United States, 335 U.S. 601 ,613.

Although, as indicated above, the Court has not yet supplied an "exhaustive" catalog of objective impediments to compliance with a procedural rule, the court, or in some cases the lower courts, have concluded that the following situations satisfy the "cause" requirement. (1) Actions of the State, State Courts, or other officials hindered compliance with the procedural rule or made compliance, impracticable. Strickler v. Greene, 527 U.S. 263, 283, 289 (1999). (2) Petitioners counsel was responsible for the default and counsels actions, (or omissions) in this regard may properly be "imputed to the State because:

(a) The default occurred at a stage of the proceedings at which the petitioner was constitutionally or statutorily entitled to the effective assistance of counsel (which includes certain pretrial proceedings the trial itself, and under certain circumstances, the appellate and post-conviction stages of a case.) and counsel rendered ineffective, assistance in violation of the

sixth amendment (either in general or simply with respect to the defaulted issue.)

(b) Petitioner's counsel was responsible for the default, but petitioner cannot be required to bear the risk of the attorney's error that resulted in the procedural default. because counsel was not acting as petitioners agent with regard, to the default.

(3) Responsibility for the default "properly may be imputed to the State because the petitioner was acting pro se at the time the default occurred, and because:

(a) the petitioner was forced to act pro se as a result of a violation of the petitioners constitutional or statutory rights to counsel, to effective assistance of counsel, to conflict, free counsel, or to retain counsel of choice.

(b) A judge, prosecutor, court clerk or some other official interfered with the petitioners ability to comply-or failed to take reasonable steps to facilitate the petitioners compliance, with the applicable state procedural rule.

Prejudice: The Supreme Court has not yet provided a precise definition of the prejudice half of the "cause and prejudice" exception to the procedural default doctrine. see for example, Amadeo v. Zant, 486 U.S. 214,221, Wainwright v. Sykes, 433, U.S. 72, 87. United States v. Frady, 456, U.S. 152,168. The court has said that prejudice requires more than a possibility of prejudice, and the error must have "worked to the petitioner's actual and substantial disadvantage.

Petitioner concedes in his answer to the return of writ that those grounds raised in his habeas corpus are, as Respondent has argued, been proceduraly defaulted. However, petitioner submits that this default can be attributed to several factors recognized by the courts to be an exception to the default doctrin, cheifly among them is the State intervention cause.

CAUSE FOR DEFAULTED CLAIMS.

As previously noted, the court in Strickler, *supra*, has stated that acts or omissions by counsel could be grounds for excusing the default. In the instant habeas petition, petitioner was lead to believe that his case would be given consideration by the Ohio Public Defenders office for additional litigation to the Ohio Supreme court,(i.e. the States highest Court.) however, only days before the deadline was due to file his merit brief to the Ohio Supreme court, petitioner was informed by the Ohio Public Defenders office that no assistance would be provided to him. This left petitioner with practically no time to preapir a timely appeal to the court in order that his claims may be properly exhausted for Federal review and as such, counsels untimely notice deprived petitioner of the opportunity to seek counsel elsewhere or accord him the opportunity to file a timely appeal for exhaustion purposes, and thereby prejudiced, petitioner beyond a reasonable doubt.

ACTUAL INNOCENCE CLAIM:

A petitioner who has committed a procedural default may be excuse from the default and obtain federal review of his constitutional

claims only by showing "cause" and "prejudice" or by demonstrating that failure to consider the claims will result in a fundamental miscarriage of justice. As the courts has explained, the "principles of comity and finality that inform the concepts of cause and prejudice must yield to the imperative of correcting a fundamentally unjust incarceration. Engle v. Isaac, 456 U.S. 107 135.

Although petitioner did not raise a claim attacking the sufficiency of the evidence in State Court. He did raise the issue as it relateated to the evidence itself. The record is plain on it's face that the evidence was wholly insufficient to convict petitioner and absent this courts intervention, petitioner will suffer a grave miscarriage of justice. Counsels failure to presen an argument on the sufficiency of the evidence is but one more example of petitioner having to endure ineffective assistance of counsel throughout these proceedings.

CONCLUSION.

WHerefore, and for those reasons stated, petitioner prays that this honorable court grant him the relief sought.

Respectfully submitted
Mark Barclay #4341-816
Mark Barclay.
Man.C.I.
P.O. Box 788
Mansfield, Ohio 44901

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Answer to Return Of Writ.

has been sent by regular U.S. Mail to Stephanie Warner Bircher; Asst. Attorney General: 150 E. Gay Street, Columbus, Ohio 43215, on this 25 day of November, 2005.

Mark Barclay 434-816
DEFENDANT, *pro se*